Comments of the Independent Regulatory Review Commission

Insurance Department Regulation #11-258 (IRRC #3252)

Mental Health Parity Analysis Documentation

April 8, 2020

We submit for your consideration the following comments on the proposed rulemaking published in the February 8, 2020 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (71 P.S. § 745.5b). Section 5.1(a) of the Regulatory Review Act (71 P.S. § 745.5a(a)) directs the Insurance Department (Department) to respond to all comments received from us or any other source.

1. Statutory authority.

A commentator questions if the Department's authority to promulgate regulations under Section 606-B of the Insurance Company Law (40 P.S. § 908-16) extends to mental health parity compliance in the individual and small group markets. We ask the Department to further explain why this regulation is consistent with its statutory authority.

2. Possible conflict with or duplication of statutes or existing regulations.

One commentator is concerned that the proposed regulation could result in conflicting agency positions on a health plan's "network adequacy." The commentator explains that state and federal regulators take the position that "network adequacy" is a nonqualitative treatment limitation (NQTL) for purposes of The Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA). The Department of Health has regulatory authority currently over "network adequacy" standards for managed care organizations, including health maintenance organizations (HMOs) and certain preferred provider organizations (PPOs). The commentator is concerned that one Department may approve an HMO/PPO as meeting the network adequacy standard yet the other may find it inadequate for purposes of MHPAEA compliance. The Department should explain how conflicts, like the one described by the commentator, will be addressed. Also, the Department should review its response to RAF #13 and, if necessary, revise it.

3. Determining whether the regulation is in the public interest; and Compliance with the RRA.

Section 5.2 of the RRA (71 P.S. § 745.5b) directs this Commission to determine whether a

regulation is in the public interest. When making this determination, the Commission considers criteria such as economic or fiscal impact and reasonableness. To make that determination, the Commission must analyze the text of the proposed regulation and the reasons for the new or amended language. The Commission also considers the information a promulgating agency is required to provide under Section 5 of the RRA in the Regulatory Analysis Form (RAF) (71 P.S. § 745.5(a)).

The *Explanation of Regulatory Requirements* contained in the Preamble is not sufficient to allow this Commission to determine if the regulation is in the public interest. Specifically, the description of § 168.4 (relating to analysis and disclosure documentation) is overly broad. The Department should provide a more detailed description for each insurer requirement and specify why it is needed.

The summary of the Definitions section does not explain key terms that are incorporated into the new chapter. For instance, the term "insurer," which is utilized throughout the proposed regulation and effectively establishes the applicability of the proposed rulemaking, is discussed only in the RAF. (RAF #15) Since the RAF is not published in the *Pennsylvania Bulletin*, we ask the Department to include a revised Preamble to the final-form regulation that expounds key terms such as "insurer," "medical management," "qualitative treatment limitations," and "nonqualitative treatment limitations." The revised Preamble should also explain the various types of health insurance entities, plans and markets affected by this rulemaking.

RAF

The Department's response to RAF #12 does not answer how the regulation compares with those of other states. The Department should include this information in a revised RAF when it submits the final rulemaking.

4. Implementation procedures.

The effective date and expected date for compliance are "upon final publication as final-form in the *Pennsylvania Bulletin*." The Department anticipates that the final version of the rulemaking will be submitted for review "Summer 2020."

A commentator states that health insurance issuers will have already filed forms and rates for the 2021 plan year by the projected delivery date of the final-form regulation. Commentators ask for sufficient time to implement the new analysis and documentation requirements. In particular, they note the complications involved in adding requirements to health insurance plans that have already been filed with the Department. Commentators urge the Department to delay the effective date until January 1, 2022.

The Department should explain the implementation schedule for compliance. We ask that the Department ensure that the effective and compliance dates provide sufficient time for insurers to comply with the new mental health parity analysis documentation requirements.

5. Communication with the regulated community.

Based on the comments, there is general agreement with the substance of the filing requirements. Some commentators that worked with the Department on developing legislation feel strongly that the rulemaking should address issues like what constitutes qualitative treatment limitations (QTLs) and NQTLs or delineate the role of the Department of Health in ascertaining parity.

Some confusion exists as does varying opinions on the markets or products to which this regulation should apply. As mentioned previously, one commentator questions the Department's authority to extend the requirements of the rulemaking to individual and small group markets, while another would prefer the Commonwealth use its authority to include integrated delivery systems and utilization review entities.

Finally, a commentator, representing people in recovery, families, and addiction treatment programs, expresses concern that the proposal does not go far enough to protect consumers and recommends stronger transparency measures. They recommended that insurers be required to notify subscribers of the addiction treatment coverage available to them and how to access it. This same commentator suggests that people in recovery, and representatives of the drug and alcohol addiction treatment community be part of future discussions regarding the rulemaking.

We encourage the Department to continue its dialogue with the regulated community and actively seek input from the individuals for whom the implementation and enforcement of mental health parity benefit.

5. Section 168.3. Annual attestation. --Clarity; and Implementation procedures.

A commentator recommends strengthening this section by adding the requirement that the attestation be signed by an officer of the company. We would agree with the commentator's suggestion to add language in this regard as it provides greater clarity and accountability.

6. Section 168.4. Analysis and disclosure documentation. --Reasonableness of requirements, implementation procedures and timetables for compliance by the public and private sectors.

Subsection (a)(1) and (2)

These subsections require an insurer to perform and document a baseline parity analysis to demonstrate compliance with MHPAEA and Mental Health and Substance Use Disorder (MH/SUD) Parity Federal Regulations for each quantitative treatment limitation and each NQTL applicable to a MH/SUD benefit and also a parity analysis for each change to a quantitative treatment limitation or NQTL treatment limitation applicable to a MH/SUD benefit. We have several questions. What are quantitative and nonquantitative treatment limitations?

The Definitions section in the proposed Annex defines "treatment limitations," but does not include definitions for "quantitative" or "nonquantitative" in the context of treatment limitations. We ask the Department to define these terms in the Annex or explain why it is unnecessary to do

so. Should the Department decide not to include these terms in the Definitions section of the final Annex, it should revise the Preamble of the final form rulemaking to include examples of their meanings.

Based on the comments received, we understand that quantitative treatment limitations are numerical in nature, such as visit limits, and NQTLs are non-numerical limits on the scope or duration of benefits for treatment, such as pre-authorization requirements. There seems to be little to no confusion regarding the documentation of QTLs as they are easily measured. The application and analysis of NQTLs, on the other hand, are less clear. According to one commentator, there is no definitive list of what "is" and "is not" a NQTL. The Department should explain how insurers will know, for purposes of conducting MPHAEA documentation and analysis, what constitutes a NQTL?

Commentators ask the Department to develop an optional-use mental health parity documentation analysis template to use as a reference when conducting their QTL and NQTL analysis and documentation. Has the Department considered creating its own template for optional use by insurers?

The Department's response to RAF #22b states that no forms are required for implementation of the regulation. However, insurers may create their own or use an optional template. How will the regulated community be directed to the hyperlinks identified in RAF # 22b? Will they be accessible from the Department's webpage? If an insurer creates their own form, how will they know it is appropriate or adequate?

Subsection (c)

One commentator states that the requirement to maintain a written QTL analysis for thousands of distinct policies for an unspecified period poses a significant administration burden. The Department should explain its rationale for this subsection. It should also include whether any alternative approaches to QTL documentation were considered. What is the required length of time that insurers must maintain the documentation required under this subsection?

Subsection (d)(2)

We suggest the Department include a time frame by which an insurer must respond to a request for information and documentation under this section or explain why it is unnecessary and not in the public interest.

7. Miscellaneous clarity.

- § 168.4 (d)(1) reads "The information and documentation set forth in subsections (a)(1)-(3), (b) and (c) shall be . . . ." Since (1)-(3) is all inclusive, it should be revised to read: "The information and documentation set forth in subsections (a)-(c) shall be . . . ."

- In § 168.4 (d)(3) we recommend referencing the state's Right to Know Law in terms of the use of "trade secret" or "confidential proprietary information." Also, we suggest replacing the term "provision" with "section.